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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 121

BLACK DIAMOND STEAMSHIP CORP.,
PETITIONER,

vs.

ROBERT STEWART & SONS, LTD., ET AL.

No. 130

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

ROBERT STEWART & SONS, LTD., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED {JUNE 25, 1948.
JUNE 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 15, 1948.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A-18610

In the Matter of the Petition of the UNITED STATES OF AMERICA, as Owner, and BLACK DIAMOND STEAMSHIP CORP., as Bareboat Charterer, of the Steamship NORWALK VICTORY, for Exoneration From or Limitation of Liability

DOCKET ENTRIES

1947

Oct. 28. Petition and stipulation for Petitioner's costs filed.

Oct. 29. Bond filed by Black Diamond Steamship Corp.

Nov. 5. Exceptions to petition filed.

Nov. 6. Filed notice of hearing on exceptions.

Nov. 10. By Inch, *J.*: Order filed. Exceptions of the damage claimants sustained. The petition for limitation of or exoneration from liability dismissed.

Dec. 22. By Inch, *J.*: Findings of Fact and Conclusions of Law filed.

1948

Jan. 5. Notice of Appeal filed.

Jan. 5. Assignments of Error filed.

Jan. 6. Bond on appeal filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

PETITION FOR LIMITATION OF LIABILITY

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The Petition of the United States of America, as owner, and Black Diamond Steamship Corp., as bareboat charterer, of the Steamship Norwalk Victory, in a cause of Limitation of and Exoneration from Liability, civil and maritime, alleges as follows:

First: At all the times hereinafter mentioned the petitioner, United States of America, was and now is a Corpo-

ration Sovereign and the owner of the steamship Norwalk Victory.

Second: At all the times hereinafter mentioned the petitioner, Black Diamond Steamship Corp., was and now is a corporation organized and existing under the laws of the State of Maryland, with an office and place of business at No. 39 Broadway, Borough of Manhattan, New York City, N. Y., and was and is the bareboat charterer of the steamship Norwalk Victory.

Third: The Norwalk Victory is a steel screw steamer of 7,606 tons gross and 4549 tons net register, about 455 feet long, 62 feet beam and 38 feet depth, and was built in Portland, Oregon, in 1945.

Fourth: The petitioners used due diligence to make the steamer Norwalk Victory seaworthy before the commencement of the voyage involved herein, and she was, prior to the collision hereafter mentioned, tight, staunch and strong, and properly and efficiently officered, manned, equipped and supplied, and was in all respects seaworthy and fit for the service in which she was engaged.

[fol. 3] Fifth: On April 28, 1947, the Norwalk Victory was completing a voyage from New York to Antwerp, Belgium and Rotterdam, The Netherlands, having put into Antwerp as the first port of call.

She left her pier at Antwerp, bound for Rotterdam, at 7:50 P. M., European Central Time, having on board about 1150 tons of cargo. Her port and starboard side lights and her masthead, stern and range lights were lit and burning brightly. The night was clear, with the stars shining brightly and the moon in the first quarter. The tide was ebb, the tidal current in the river Schelde being approximately three knots, and the wind was westerly, about force two.

The junior third mate was on watch on the lower bridge, an able seaman was at the wheel, and another able seaman was stationed on the forecastle head as lookout. The master was in the pilot house and on the bridge at all times prior to the collision and there was also a docking pilot on the bridge who had charge of the ship's navigation down to the lock called Kruisschans Sluice, which was about 3½ miles from the basin in which the vessel had been lying.

The Norwalk Victory anchored outside the lock at 9:05 P. M. and remained at anchor until 10:22 P. M. waiting for another vessel to pass through the lock. She entered the lock at 10:54 P. M., at which time a Schelde River pilot boarded her and from then on was in charge of her navigation. She left the lock at 11:26 P. M. going out between two lines of piles, and then entering the river proper, which takes a sharp bend at that point.

From there the channel follows the easterly side of the river down to occulting red buoy 52, but on approaching buoy 52 the channel runs on the westerly side of the river. [fol. 4] About a mile below buoy 52 and closer to the westerly bank of the river there was a sunken wreck of a steamer indicated by a green wreck buoy, and the Norwalk Victory was required to navigate to the westward of that buoy, below which the river takes another bend.

The Norwalk Victory passed to the westward of buoy 52 and it was then necessary to put her rudder to the left and later to the right in order to pass around the green wreck buoy on its westward side. The ship's rudder was put left at 11:40 P. M., her engines being slow ahead. At about that time a vessel, which later proved to be the British steamer Merganser, was observed coming up the river below the bend, showing her masthead and range lights and her red side light. The river pilot of the Norwalk Victory ordered her rudder right in order to round the wreck buoy, and blew to the other vessel a signal of one blast which was not answered. It at once became apparent that the Norwalk Victory was not responding to the right rudder order, whereupon the pilot ordered the rudder hard right but the vessel still did not respond. The pilot then ordered the engines full ahead momentarily in an effort to bring the ship around, but without success. Immediately afterward the pilot ordered the engines full astern and blew a signal of three blasts, followed very shortly by a second signal of three blasts, to which the Merganser responded with three blasts. Following the Norwalk Victory's second three-blast signal, an order was given to stand by both anchors, but there was not sufficient time to drop them.

A collision occurred at 11:45 P. M., in the vicinity of Lillo, Belgium, the Norwalk Victory striking the Merganser amidships on her port side. The Norwalk Victory, following the collision, backed aground on the left bank of the river. The Merganser began to sink and soon was partially

[fol. 5] submerged, with her forward end resting on the river bottom. She remained in that position until the next morning, when she settled to the bottom of the river, showing only her superstructure, masts and funnel. The petitioners are informed that the chief steward of the Merganser, a man named Turner, his given name being unknown to the petitioners, was killed in the collision.

Shortly after the collision, when the after end of the Norwalk Victory was fast aground in the mud, her port steering engine, which was the one being used prior to the collision, was examined and the rudder was found jammed to the left. When the vessel was refloated the next morning a further inspection revealed that the rudder would not come center with the port engine. After a general survey the vessel proceeded on to Rotterdam using her starboard steering engine. On the way to Rotterdam the bonnets of the valves on the port steering engine were removed and a piece of marline about four inches long, which was rolled up into the form of a ball, was found lodged beneath a check valve on the inlet and outlet of the port pump. This small piece of marline prevented the check valve from closing, with the result that the oil pressure which should have moved the ram of the steering gear was returned to the pump, rendering the port steering gear inoperative. The system was a closed one, there being no way of inducing any such matter into it after it was closed, as it was at or before the time the construction of the ship was completed and she was placed in operation. This piece of marline therefore was somewhere in the system from the time the vessel was built, in 1945, no one being aware of or suspecting its existence because of the uniformly excellent performance of the steering gear.

[fol. 6] Sixth: Those in charge of the Norwalk Victory were careful at all times in the performance of their duties and navigated the Norwalk Victory prudently and skillfully. The aforesaid collision and the loss, damage and destruction resulting therefrom were not caused or contributed to by any fault, negligence or want of care on the part of the Norwalk Victory, or those in charge of her, or the petitioners herein, or by anyone for whom the petitioners may be responsible, and were occasioned and occurred without the privity or knowledge of the petitioners, and so far as the petitioners and the Norwalk Victory were concerned were an inevitable accident.

The said collision and consequent loss, damage and destruction were, on the other hand, caused solely by the negligence of the steamship Merganser and those in charge of her in the following respects, among others which will be pointed out upon the trial:

1. She was not in charge of competent persons.

2. She failed to keep a proper lookout.

3. The persons in charge of her were not attentive to their duties.

4. She violated Article 40 of the Navigation Rules for the Belgian section of the Schelde River providing that where vessels are meeting at a bend in the river the vessel proceeding against the tide shall hold back until the vessel proceeding with the tide is safely past the bend.

5. She was proceeding at an excessive rate of speed under existing conditions.

6. She failed to answer the Norwalk Victory's one-blast signal.

7. She failed seasonably to stop and reverse her engines.

[fol. 7] 8. She failed to take any steps to avoid the collision after she knew of the presence of the Norwalk Victory.

Seventh. A suit has been brought in this Court against the petitioners and the steamship Norwalk Victory by the British Government and the individuals or concerns below listed, claiming to be owners of cargo on the Merganser, which cargo, it is alleged, was lost as a result of the collision, namely: Robert Stewart & Sons, Ltd., Kessler & Co., Ltd., Van de Wouwer Freres, Potash Ltd., Captain A. R. Cook, Odon Warland, G. Drugmand & Ch. Meert, Armand Gavage, Vereinigts Schumaschinen Aktiengasselschaft, Romeo Canovai & Figli, A/G der Voslauer Kammgarnfabrik, Thomas Frederick & Co., Ltd., S. R. Carrington & Sons, Ltd.. Cupal Ltd., Edwin Butterworth & Co., Ltd., Gandy Ltd., Failsworth Hats, Ltd., Jas. Williamson & Son, Ltd., Leon Lapage & Co. and His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

The damages claimed in the said suit aggregate One Million ($1,000,000.) Dollars. The proctors for the libel-

lants are Messrs. Dow & Symmers of 70 Pine Street, New York City, N. Y.

In addition, a suit has been brought against the petitioner, Black Diamond Steamship Corp., by the owner of the Merganser, British and Continental S. S. Co. Ltd., in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of said vessel. In that suit the petitioner, Black Diamond Steamship Corp., has posted bail in pounds sterling, which, at the current rate of exchange, is equivalent to One Million ($1,000,000.) Dollars.

Also, a suit no doubt will be brought against the petitioners, or one of them, by the personal representatives of the said decedent, Turner.

[fol. 8] There is also a possibility of a suit against the petitioners by the Belgian Government for damages to the bank of the River Schelde, claimed to have been caused by the collision, and for the cost of removing the wreck of the Merganser from the river.

There also may be additional suits against the petitioners by other owners of cargo on the Merganser.

Eighth. There are no demands against the petitioners, and no demands, unsatisfied liens or claims of liens against the steamship Norwalk Victory arising out of the said collision, or any suits pending thereon, so far as is known to the petitioners, except as above set forth.

Ninth. No written notice of claim was given to the petitioners or either of them by anyone at any time more than six months prior to the filing of this petition.

Tenth. The aforesaid collision having occurred within the territorial waters of Belgium, the law of Belgium with respect to the limitation of liability of ship-owners is the law applicable to this case.

Eleventh. The Belgian law as to limitation of liability is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Seagoing Vessels, which was signed at Brussels on August 25, 1924, and ratified by Belgium on June 2, 1930. The convention first took effect on June 2, 1931.

Twelfth. The parts of the Convention which are pertinent to this case are as follows:

"Article 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of [fol. 9] the vessel, the freight, and the accessories of the vessel, in respect of—

(1) Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

. . . . . .

(5) Any obligation to raise the wreck of a sunken vessel, and any obligations connected therewith;

. . . . . .

Provided that, as regards the cases mentioned in Nos. (1), (2), (3), (4) and (5), the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to £8 per ton of the vessel's tonnage.

. . . . . .

Article 4. The freight referred to in Article 1 (including passage money), is deemed, as respects vessels of every description, to be a lump sum fixed at all events at ten per cent. of the value of the vessel at the commencement of the voyage.

. . . . . .

Article 7. Where death or personal injury is caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles up to £8 per ton of the vessel's tonnage.

. . . . . .

Article 10. Where a person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in Article 1 or

[fol. 10] Article 7, the provisions of this Convention are applicable to him.

Article 11. For the purposes of the provisions of the present Convention, 'tonnage' is calculated as follows:

In the case of steamers and other mechanically-propelled vessels, net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine-room space for the purpose of ascertaining the net tonnage; * * *"

Thirteenth. The net tonnage of the Norwalk Victory is 4,549 tons and the amount deducted from her gross tonnage on account of engine room space to ascertain net tonnage is 2434.05 tons, making a total of 6,983.05 tons for the purposes of the provisions of the said Convention. The value of the Norwalk Victory at the commencement of the voyage was One Million ($1,000,000.) Dollars.

The amount to which the petitioners' liability, if any, is limited, under the said Brussels Convention, apart from the death of the decedent Turner, is therefore $325,028.79, which sum is arrived at by multiplying the said 6,983.05 tons by eight, making 55,864.40 pounds, and converting this sum into dollars at the rate of exchange of $4.02-13/16ths as of April 28, 1947, giving $225,028.79, and adding thereto $100,000., being 10% of the vessel's sound value at the commencement of the voyage.

Fourteenth. The petitioners claim exemption from liability for the losses, damages, injuries and destruction resulting from the aforesaid collision and for the claims for damages that have been made or hereafter may be made in connection therewith, and allege that they have valid defenses thereto.

[fol. 11] The petitioners further claim the benefit of the limitation of liability provided in the aforesaid Brussels Convention.

The petitioner, United States of America, being a Corporation Sovereign, asks that no bond be required of it.

The petitioner, Black Diamond Steamship Corp., submits herewith its stipulation, with sufficient surety, for the payment, into Court of the sum of Three Hundred and Twenty-five Thousand Twenty-eight and 79/100ths ($325,028.79) Dollars, the amount of the petitioners' liability as

limited by the aforesaid Brussels Convention, whenever the payment of such sum shall be ordered by this Court.

With respect to the decedent Turner, the petitioners ask leave to apply to the Court for an order directing the filing of an additional stipulation sufficient to cover the amount of a probable recovery for his death, if liability therefor is found to exist, when information is received from which to determine the fair amount of such stipulation.

Fifteenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the petitioners pray:

1. That the Court rule that the amount to which the petitioners' liability herein, if any, is limited, is governed by the law of Belgium, and specifically the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Seagoing Vessels.

2. That the Court approve the stipulation submitted herewith by the petitioner, Black Diamond Steamship Corp., [fol. 12] for the payment of the said sum of $325,028.79 into Court whenever the Court shall so direct.

3. That the Court make an order directing the issuance of a monition to all persons claiming or who may claim damages for any and all loss, damage, injury or destruction resulting from the aforesaid collision, citing them in said order to file their claims with the Clerk of the Court, and to make due proof of their respective claims and also to appear and answer the allegations of this petition according to law and the practice of this Court at or before a time certain to be fixed by said monition.

4. That the Court issue its injunction restraining the prosecution of any and all suits, actions and proceedings that may have been already begun to recover damages arising out of, occasioned by, or consequent upon the collision between the steamships Norwalk Victory and Merganser, set forth in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature against the Norwalk Victory and/or the petitioners, except in the present proceeding, in respect of any claim or claims arising out of the said collision.

5. That the Court in this proceeding adjudge that the petitioners are not liable to any extent for any loss, damage, injury or destruction or for any claim whatsoever in any way arising out of or in consequence of the said collision; or if your petitioners shall be adjudged liable, that their liability be limited to the sum of Three Hundred and Twenty-five Thousand Twenty-eight and 79/100ths ($325,028.79) Dollars, plus whatever further sum may be fixed to cover the death of the decedent, Turner, as provided by the said Brussels Convention; and that any moneys decreed to be paid be divided pro rata among such [fol. 13] claimants as may duly prove their claims as hereinbefore provided, saving to all parties any priorities to which they may be legally entitled, and that a decree thereupon be entered discharging the petitioners from all further liability.

6. That the petitioners may have such other or further or different relief as the justice of the cause may require.

J. Vincent Keogh, Esq., for Petitioner, United States of America, Hunt, Hill & Betts, of Counsel. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp., Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City.

(Verified on October 28, 1947, by Albert C. Valentine, as Secretary and Treasurer of Black Diamond Steamship Corp., one of the petitioners herein.)

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND

AMERICAN SURETY COMPANY OF NEW YORK

Organized 1884

Whereas United States of America, as owner, and Black Diamond Steamship Corp., as bareboat charterer, of the steamship Norwalk Victory, are about to file in this Court their Petition for limitation of their liability in respect of a collision which occurred between the steamer Norwalk Victory and the British steamer Merganser in the Schelde

River, Belgium, on April 28, 1947, in which the petitioners pray, among other things, that their liability, if any, be limited in accordance with the provisions of the Brussels Limitation of Liability Convention signed August 25, 1924, and that a monition may issue to all persons claiming damages for loss, damage, injury or destruction resulting from said disaster, citing them to appear and file their claims with the Clerk of the Court and to make due proof of their respective claims and to answer the petition herein, and that an injunction issue restraining the prosecution of any and all actions, claims or proceedings except in pursuance of the provisions of a monition granted herein; and

[fol. 15] Whereas the petitioners wish to stay the further prosecution of the suit (No. 18593) entitled Robert Stewart & Sons, Ltd., Et Als, Libellants,—Against—SS Norwalk Victory, Her Engines, etc., Black Diamond Steamship Corporation and United States of America, Respondents, instituted against them on or about October 14, 1947, in this Court for damage to cargo allegedly resulting from the said collision, and the commencement or prosecution hereafter of any and all suits, actions or legal proceedings of any nature or description whatever in any and all Courts; and

Whereas said Petitioners wish to provide a bond in behalf of Black Diamond Steamship Corp. as security for any claims by reason or on account of said Collision to the extent to which the petitioners' liability, if any, should be limited under the provisions of the said Brussels Convention, and

Whereas, the petitioner, United States of America, being a Corporation Sovereign, is not obliged to give such a bond;

Now, therefore, in consideration of the premises, said Petitioner, Black Diamond Steamship Corp., as Principal, and American Surety Company of New York, of No. 100 Broadway, Borough of Manhattan, City of New York, as Surety, hereby jointly and severally undertake in the sum of Three hundred and twenty-five thousand twenty-eight and 79/100ths ($325,028.79) Dollars, with such interest thereon as may be awarded by the Court, that if any of the persons who are party libellants to the said suit No. 18593, or any other persons making, within the time to be prescribed in such monition, any claims arising out of the said collision, recover thereon, the decree or decrees may be entered against them and each of them for an amount or amounts not exceeding in all the beforementioned sum with

[fol. 16] interest thereon as aforesaid, and said Principal and Surety do consent and agree that thereupon execution therefor may issue against their and each of their goods, chattels, lands and tenements or other real estate.

And the said Black Diamond Steamship Corp., as such Principal, and said American Surety Company of New York, as such Surety, do hereby further jointly and severally undertake that they the said Principal and Surety shall abide by all orders of the Court, interlocutory or final and pay such amounts as may be respectively awarded by the final decree or final decrees rendered by this Court or by any Appellate Court if an appeal intervene, with interest as aforesaid, in all not exceeding the beforementioned sum, together with such interest as may be awarded by the Court, then this obligation to be void, otherwise to remain in full force and virtue.

Provided, however, That the total liability in all upon this instrument shall not exceed the beforementioned sum of Three hundred twenty-five thousand twenty eight and 79/100 Dollars ($325,028.79) with interest thereon as aforesaid, and this instrument shall to that extent stand only as security for all claims properly filed in the said limitation proceeding.

Signed, sealed and dated this 28th day of October 1947.

Black Diamond Steamship Corp. By: M. J. Hanlon, Vice Pres. American Surety Company of New York, by: Leon Sekeson, [L. s.] Resident Vice President, Attest: M. S. Godwin, Resident Ass't Secretary.

(Financial statements, acknowledgments, etc. omitted.)

[fol. 17] In United States District Court

Exceptions to Petition.

Robert Stewart & Sons, Ltd., et als., claimants (heretofore having duly filed in this Honorable Court a libel in an independent cause of cargo damage, civil and maritime, No. 18593, against the S. S. Norwalk Victory, and her owners and operators who are the petitioners herein), ex-

cept to the petition for exoneration from or limitation of liability herein on the following grounds:

First: That the allegations of the petition are insufficient to give this Honorable Court jurisdiction of a statutory proceeding for the limitation of liability in that the requirements of the Limitation of Liability Statutes, Title 46, U. S. Code, Chapter 8, have not been complied with.

Second: That this Court may not take jurisdiction of this limitation of liability proceeding as petitioners have not deposited with the Court a sum, or approved security therefor, equal to the amount or value of the interests of such owners in the vessel and freight, nor have the interests of such owners therein been transferred to a trustee, as required by Title 46, U. S. Code, Section 185.

Third: That this Court should decline jurisdiction of this limitation of liability proceeding because petitioners have not complied with the applicable Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court (Title 28, U. S. Code, following Section 723), namely Rules 51, 52, 53 and 54.

[fol. 18] Fourth: That this Court should decline jurisdiction of this limitation of liability proceeding because petitioners have not complied with the Admiralty Rules of this Court now in effect, namely Rules 31, 32, 33, 34 and 35.

Dated: New York, N. Y., November 5, 1947.

Dow & Symmers, Proctors for Claimants, 70 Pine Street, New York 5, New York.

[fol. 19] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION ON HEARING ON EXCEPTIONS

SIRS:

Please take notice that the exceptions taken by Robert Stewart & Sons, Ltd., cargo damage claimants herein, to the petition for exoneration from and limitation of liability of the above-named owner and bareboat charterer of the SS Norwalk Victory will be brought on for argument and a motion made to sustain said exceptions and dismiss said petition before the Honorable Robert A. Inch, United

States District Judge, in his chambers, Room 310, United States District Court, Post Office Building, Washington Street, Borough of Brooklyn, City and State of New York, on the 6th day of November, 1947, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: November 5, 1947.

Yours, etc., Dow & Symmers, Proctors for Damage Claimants, 70 Pine Street, New York 5, New York.

To: Messrs. Hunt, Hill & Betts, Proctors for Petitioners, 120 Broadway, New York, New York.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION

The petitioners herein, having filed on October 28, 1947, a petition for limitation of and exoneration from liability in respect of a collision between the petitioners' American S.S. Norwalk Victory and the British S.S. Merganser, which occurred in the River Scheldt, Belgium, on April 28, 1947, which petition alleges and invokes the law of Belgium with respect to limitation of shipowners' liability as the law applicable to the proceedings herein; and petitioner Black Diamond Steamship Company, as bareboat charterer of the said S.S. Norwalk Victory, valued in the petition at $1,000,000.00, having filed on October 29, 1947, a stipulation for limitation of liability in an amount of $325,028.79, alleged to be sufficient security under the said Belgian law; and certain damage claimants, owners of cargo lost or damaged on the S.S. Merganser, having heretofore filed a libel against the S.S. Norwalk Victory and the petitioners herein as her owners and operators, and said damage claimants having duly filed their exceptions herein to the said petition for limitation of liability on the grounds, among others, (1) that the allegations of the petition are insufficient to give this Court jurisdiction of a statutory proceeding for limitation of liability in that the requirements of the Limitation of Liability Statutes, Title 46, U. S. Code, Chapter 8, have not been complied with, and (2) that this Court may not take jurisdiction of this limitation of liability

proceeding as petitioners have not deposited with the Court a sum, or approved security therefor, equal to the amount or value of the interests of said petitioners in the vessel and [fol. 21] freight, nor have the interests of said petitioners been transferred to a trustee, as required by Title 46 U. S. Code, Section 185, and the Admiralty Rules of the United States Supreme Court and of this Court applicable thereto; and said damage claimants, by their proctors, Dow & Symmers, Esqs., having duly brought said exceptions on for argument before the Honorable Robert A. Inch, United States District Judge, on November 6, 1947, and having moved for an order sustaining said exceptions and dismissing the petition, and after hearing Messrs. Dow & Symmers, proctors for damage claimants, by William G. Symmers and John S. Stillman, Esqs., in support of the motion, and Messrs. Hunt, Hill & Betts, proctors for the petitioners, by John W. Crandall and Robert M. Donohue, Esqs., in opposition thereto, and due deliberation having been had, and this Court having determined that the exceptions herein must be sustained and the motion dismissing the petition granted, on authority of *Oceanic Steam Navigation Co.* v. *Mellor* (The Titanic), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro*, 31 Fed. (2d) 757, 50 Fed. (2d) 207, aff'd 55 Fed. (2d) 1082, cert. den. 287 U. S. 607, holding that the procedures and jurisdictional requirements on limitation of liability, including provisions as to petitioner's stipulation for value, must be controlled by the Limitation of Liability Statutes of the United States where the jurisdiction of a United States Court is invoked.

Now, on motion of Dow & Symmers, Esqs., proctors for the damage claimants, it is

Ordered that the exceptions of the damage claimants herein be and the same hereby are sustained, and it is further

[fol. 22] Ordered that the petition for limitation of or exoneration from liability herein be and the same hereby is dismissed.

Dated, Brooklyn, N. Y., November 10, 1947.

Robert A. Inch, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

FINDINGS OF FACT.

The Court makes the following findings of fact in accordance with its written decision and order filed herein on or about November 10, 1947, wherein the exceptions of the damage claimants to the petition herein were sustained and the petition dismissed. These findings are based upon the allegations in the petition, are admitted by the damage claimants solely for the purpose of the exceptions, and are not to be construed as findings other than for the purpose of disposing of such exceptions:

1. The petitioner, United States of America, is a corporation sovereign and at the times stated herein was the owner of the steamship Norwalk Victory.

2 The petitioner, Black Diamond Steamship Corp., is a corporation organized and existing under the laws of [fol. 23] Maryland, with an office and place of business at No. 39 Broadway, New York City, N. Y., and at the times stated herein was the bareboat charterer of the Norwalk Victory.

3. The Norwalk Victory is a steel screw steamer of 7,606 tons gross and 4,549 tons net register, about 455 feet long, 62 feet beam and 38 feet depth, and was built in Portland, Oregon, in 1945.

4. On April 28, 1947, the Norwalk Victory was completing a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands, on which voyage she put into Antwerp as the first port of call.

5. The Norwalk Victory left her berth at Antwerp, bound for Rotterdam, at 7:50 P. M., European Central Time, with 1150 tons of cargo aboard.

6. While proceeding down the Schelde River the Norwalk Victory collided with the British steamer Merganser at 11:45 P. M., on April 28, 1947, in the vicinity of Lillo, Belgium, and in the territorial waters of Belgium.

7. The Merganser was loaded with cargo, and as a result of the aforesaid collision she sank and her chief steward was killed.

8. Thereafter a suit was brought by British and Continental S. S. Co., Ltd., owner of the Merganser, against the petitioner, Black Diamond Steamship Corp., in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the Merganser. In that suit the petitioner, Black Diamond Steamship Corp., posted bail in pounds sterling, which, at the current rate of exchange, was equivalent to One Million ($1,000,000) Dollars.

[fol. 24] 9. Thereafter a suit was brought against the steamship Norwalk Victory and the petitioners in this Court by Robert Stewart & Sons, Ltd., and nineteen others, stated to be owners of cargo on the Merganser at the time of the collision, and alleging that such cargo was lost as a result thereof. The damages claimed in the said suit aggregate One Million ($1,000,000.) Dollars.

10. No written notice of claim was given to the petitioners, or either of them, by anyone more than six months prior to the filing of their petition for limitation of liability in this Court.

11. The law of Belgium as to limitation of liability is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels, hereafter called the Brussels Limitation Convention.

12. The Brussels Limitation Convention was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931.

13. The Brussels Limitation Convention, in Article 1, limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight, and accessories in respect of compensation due to third parties by reason of damage caused by the acts or faults of the master, crew, pilot or any other person in the service of the vessel provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage.

14. Article 4 of the Brussels Limitation Convention provides that the freight referred to in Article 1 thereof is deemed to be a lump sum fixed at all events at ten per cent [fol. 25] of the vessel's value at the commencement of the voyage.

15. Article 7 of the said Convention provides that in the case of death or personal injury caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the decedents or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles, up to £8. per ton of the vessel's tonnage.

16. Article 10 of the said Convention makes its provisions applicable to a person who operates the vessel without owning it or who, as the principal charterer thereof, is liable under Article 1 or Article 7 of the Convention."

17. Article 11 of the said Convention provides that tonnage is to be calculated for steamers on the basis of their net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.

18. The net tonnage of the Norwalk Victory is 4,549 tons and the amount deducted from her gross tonnage on account of engine room space to ascertain her net tonnage is 2,434.05 tons, which two figures added together equal 6,983.05 tons.

19. The sound value of the Norwalk Victory at the commencement of the voyage in question was One Million ($1,000,000.) Dollars.

20. The limitation of liability provided by the Brussels Limitation Convention for property damage on the basis of the figures set forth in the two preceding Findings is [fol. 26] 55,864.40 pounds or $225,028.79, at the rate of exchange of $4.02-13/16ths prevailing on April 28, 1947, plus $100,000., being 10% of the vessel's sound value at the commencement of the voyage, making a total of $325,028.79.

21. The petitioner, Black Diamond Steamship Corp., on October 29, 1947, filed a surety bond with the Clerk of this Court in the sum of $325,028.79, in connection with the petitioners' aforesaid petition for limitation of liability herein.

Conclusions of Law

1. The right of a vessel owner to limit liability in a Court of the United States is derived from, created and exclusively controlled by the Limitation of Liability Statutes of the United States (Title 46 U. S. Code, Chapter 8, Secs. 181-188).

2. The Limitation of Liability Statutes of the United States (supra) do not impose, but only limit, an existing liability. They are not a part of the general maritime law, but are a declaration of a general policy of the United States for the administration of justice in maritime cases. They relate not to the substantive rights giving rise to the liability, but to the remedy, and that is governed by the law of the forum.

3. The fact that the collision took place in foreign territorial waters, or that one of the ships involved in the collision was British and the other American, in no way affects or alters the principles above stated.

4. In order for a District Court of the United States to assume jurisdiction of a petition for limitation of liability, [fol. 27] the petitioner must comply with the conditions imposed by the Limitation of Liability Statutes of the United States (supra).

5. Petitioner, Black Diamond Steamship Corp., having failed to deposit with this Court for the benefit of claimants "a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor", as required by Title 46 U. S. Code Sec. 185, has not met the statutory requirements to give this Court jurisdiction herein, and the petition must, therefore, be dismissed on the exceptions thereto.

6. The allegations of the petition, alleging a right to limitation of liability in accordance with the limitation of liability laws of Belgium, are insufficient in law and the exceptions to the petition must be sustained.

Dated, Brooklyn, December 22, 1947.

Robert A. Inch, United States District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that the petitioners herein hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the order entered herein on or about November 10, 1947, sustaining the exceptions of the damage claimants to the petitioners' petition for exoneration from or limitation of liability herein and dismissing the said petition, and from each and every part of the said order.

Dated, New York, December 31, 1947.

J. Vincent Keogh, United States Attorney for the Eastern District of New York, Proctor for the Petitioner, United States of America. Hunt, Hill [fol. 29] & Betts, of Counsel, Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp.

To: Percy G. B. Gilkes, Esq., Clerk of the United States District Court for the Eastern District of New York. Messrs. Dow & Symmers, Proctors for the damage claimants, 70 Pine Street, New York City.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

R. A. Inch, U. S. D. J.

Brooklyn, N. Y.

Dated, January 5, 1948.

[fol. 30] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

The petitioners hereby assign the following errors in the decision and order of the District Court of the United States for the Eastern District of New York, entered herein on or about November 10, 1947, sustaining the exceptions of

the damage claimants to the petitioners' petition for exoneration from or limitation of liability herein and dismissing the said petition, and also to the Court's conclusions of law, filed herein on or about December 22, 1947:

1. In that the District Court sustained the exceptions of the damage claimants to the petition for limitation of the petitioners' liability herein.

2. In that the District Court failed to overrule the exceptions of the damage claimants to the said limitation petition.

3. In that the District Court made and entered an order dismissing the said limitation petition.

4. In that the District Court held that the allegations of the petition alleging a right to limitation of liability under the limitation of liability laws of Belgium are insufficient in law.

5. In that the District Court held that it could not assume jurisdiction of the said limitation petition without the petitioners' complying with all the conditions imposed by the [fol. 31] Limitation of Liability Statutes of the United States.

6. In that the District Court failed to hold that inasmuch as the collision between the steamers Norwalk Victory and Merganser took place within the territorial waters of Belgium the limitation of the petitioners' liability therefor is governed by the law of Begium, namely, The International Convention for the Unification of Certain Rules of Law relating to the Limitation of the Liability of Owners of Seagoing Vessels, commonly called the Brussels Limitation Convention.

7. In that the District Court, having found that $325,028.79 is the amount to which the petitioners' liability for the property damage herein is limited by the terms of the Brussels Limitation Convention, failed to accept the bond for $325,028.79 filed herein by the petitioner, Black Diamond Steamship Corp., and to hold that such bond was adequate security for such damage.

8. In that the District Court held that this case is governed by *Oceanic Steam Navigation Co. v. Mellor*, (The Titanic), 233 U. S. 718.

9. In that the District Court held that the right of a vessel owner to limit liability in a Court of the United States was created by and is exclusively controlled by the Limitation of Liability Statutes of the United States.

10. In that the District Court held that because the petitioner, Black Diamond Steamship Corp., did not deposit with the Court a sum equal to the amount or value of its interest in the Norwalk Victory and her freight, or approved security therefor, "as required by Title 46 U. S. [fol. 32] Code Sec. 185," it had not met the statutory requirements to give the Court jurisdiction of this proceeding.

11. In that the District Court held that limitation of liability is a matter of remedy and not of substantive right, and that, as a matter of remedy, it is governed by the law of the forum.

12. In that the District Court failed to hold that limitation of liability is a matter of substantive right, which is governed by the *lex loci delicti.*

13. In that the District Court relied on *Royal Mail Steam Packet Co.* v. *Compania de Navegaco Lloyd Brasileiro,* 31 Fed (2d) 757 (E. D. N. Y.), as an authority for dismissing the said limitation petition.

14. In that the District Court held that the fact that the collision involved herein occurred within the territorial waters of Belgium did not affect the principles stated by it.

15. In that the District Court failed to distinguish this case from *The Titanic, supra,* on the ground that here the collision occurred within the territorial waters of Belgium.

16. In that the District Court failed to apply the doctrine of *The Mandu,* 102 Fed. (2d) 459 (C. C. A. 2) and 114 Fed. (2d) 361 (C. C. A. 2) wherein this Court, considering a collision occurring within the territorial waters of Brazil, held the Brussels Collision Convention to be controlling not only in the determination of liability but its measure.

17. In that the District Court failed to hold that the determination of the amount to which a ship-owner's lia- [fol. 33] bility may be limited is indistinguishable in prin-

ciple from the determination of the measure of such liability.

Dated, December 31, 1947.

J. Vincent Keough, United States Attorney for the Eastern District of New York, Proctor for the Petitioner, United States of America. Hunt, Hill & Betts, Of Counsel, Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp.

[fol. 34] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the proctors for the respective parties that the foregoing is a transcript of the record of the District Court in these proceedings, as agreed on by the parties.

Dated, New York, January 30, 1948.

J. Vincent Keogh, Proctor for the Petitioner-Appellant, United States of America, Hunt, Hill & Betts, Of Counsel. Hunt, Hill & Betts, Proctors for Petitioner-Appellant, Black Diamond Steamship Corp. Dow & Symmers, Proctors for Damage Claimants-Appellees.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 196

(Argued March 5, 1948. Decided March 29, 1948)

Docket No. 20911

UNITED STATES and BLACK DIAMOND STEAMSHIP CORPORATION, Appellants,

v.

ROBERT STEWART & SONS, LTD., et al., Appellees

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from a decree in the admiralty of the District Court for the Eastern District of New York, dismissing a petition of the owner and the "bareboat" charterer of a vessel to limit their liability.*

John W. Crandall, for the appellants.

William G. Symmers, for the appellee.

[fol. 37] L. HAND, Circuit Judge:

This is an appeal from a decree in the admiralty, dismissing the petition of the United States, as owner, and of the Black Diamond Steamship Corporation, as "bareboat" charterer, to limit their liability, arising out of a collision in Belgian waters, between their ship and a British steamer. The claimants excepted to the petition, whose allegations must therefore be taken as true, and the substance of which is as follows, so far as they are here material. After the collision the owners of the British ship, which was sunk, sued the charterer in an English court, and in that suit it posted a bond in the "equivalent" of $1,000,000. The cargo owners have sued both petitioners in the Eastern District of New York for the loss of cargo, and it is this suit which the petition is designed to enjoin. Other suits are also probable. By the law of Belgium, which has accepted the Brussels Convention upon the Limitation of Shipowners' Liability of 1924, the liability of a shipowner

* §185, Title 46, U. S. Code.

for damages, resulting from a collision, is limited to eight pounds a gross ton, plus the freight, which is arbitrarily set at ten per cent of the vessel's value at the commencement of the voyage. In the case at bar these sums together amounted to about $325,000. The value of the petitioner's vessel is $1,000,000; but they have posted a bond in only the smaller amount and the question on this appeal is whether that satisfies the statute,* or whether a bond for $1,000,000 is necessary.

The petitioners argue that the limit to the collective liabilities of a shipowner, imposed by Article One of the Limitation of Liability Convention, attaches to the liabilities themselves in the same sense that the division of liability in cases of collision attaches under the Collisions [fol. 38] Convention of 1910.* The claimants reply that the Limitation of Liability Convention goes only to the remedy, as does our own statute.** Obviously, the answer depends upon the proper interpretation of Article One of the Limitation of Liability Convention, whose language is: "The liability of the owner of a sea-going vessel is limited to an amount equal to the value of the vessel, the freight and the accessories" etc. If the petition had said in so many words that this meant that the limit attached to the right, it would be conclusive upon exceptions, since it would have been an allegation as to foreign law, which is treated as an allegation of fact; and we are not to understand the decision in *The Titanic*, *supra*,† as meaning that we would refuse to recognize limits imposed upon an owner's liability by other nations which they attached to the right. In the form in which the case comes up we should read the petition with as favorable an eye as is possible, and we shall therefore construe it to mean that the Belgian law did attach the limit to the right. However, in so doing we wish to guard against any inference that this is our own interpretation of the article. With this as a premise the petitioners go on to argue that it cannot be necessary for them to post a bond for more than the amount of that sum which is the utmost that by any chance the claimants can

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* §185, Title 46, U. S. Code.

* *The Mandu*, 102 Fed. (2) 459 (C. C. A. 2).

** *The Titanic*, 233 U. S. 718.

† 233 U. S. 718.

recover; and that the words of the statute and of the Admiralty Rule,†† however they may read literally, should not be understood to effect an intention merely to impose an idle burden on the shipowner and to benefit no one but the bonding companies.

[fol. 39] We do not find it necessary to pass on that question, for the argument puts the petitioners in a dilemma from which they cannot escape. If in fact the limit of all their liabilities is $325,000 and their ship is worth $1,000,000, they have no right to commence such a proceeding as this at all, and are confined to asserting their privilege as a defense to any suits which may be brought against them.* If on the other hand they are wrong and the liabilities may go beyond $325,000, on their own argument the bond they propose is too small. Therefore the question which they raise does not arise upon the present record; nor could it arise unless the petitioners are sued at law. It is true that should a claimant deny their right to limit liability in an action at law brought by him, the issue so raised would be justiciable only in the admiralty and would draw the whole of that litigation into the admiralty,** and it then might be necessary to decide whether the bond should go beyond the amount of the liability. However, the only suit so far brought in this country is in the admiralty, in which the right to limit could be tried anyway. If the claimants were successful in defeating that right, obviously this proceeding would not be proper; if they were unsuccessful, the same reasons would forbid the proceeding as do so now. Thus as things stand, the petitioners are not entitled to resort to a forum concursus.

Decree affirmed.

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†† No. 51.

* *The Aquitania*, 20 Fed. (2) 457 (C. C. A. 2); *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2) 273 (C. C. A. 2); *The George W. Fields*, 237 Fed. Rep. 403 (S. D. N. Y.).

** *Ex parte Green*, 286 U. S. 437.

[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, one thousand nine hundred and forty-eight.

Present Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of the Petition of UNITED STATES, as Owner, etc., & BLACK DIAMOND STEAMSHIP CORP., as Charterer, of S. S. NORWALK VICTORY, etc.; UNITED STATES and BLACK DIAMOND STEAMSHIP CORPORATION, Petitioners-Appellants; ROBERT STEWART & SONS, LTD., et al., Claimants-Appellees.

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 41] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Petition of United States, and Black Diamond Steamship Co., etc., et al. 196. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1948. Alexander M. Bell, Clerk.

[fol. 42] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 43] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

No. 121

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 44] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 130

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,123, 53,132. U. S. Circuit Court of Appeals, Second Circuit. Term No. 121. Black Diamond Steamship Corp., Petitioner, vs. Robert Stewart & Sons, Ltd., et al. Term No. 130. The United States of America, Petitioner, vs. Robert Stewart & Sons, Ltd., et al. Petitions for writs of certiorari and exhibit thereto. Filed June 25, 1948, June 28, 1948. Term No. 121 O.T. 1948, 130 O.T. 1948.